

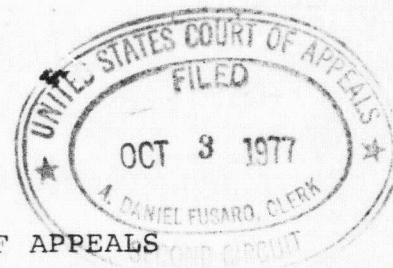
***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6102

Docket No. 77-6102



IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

WALTER AND MARIA GREEN,
Plaintiffs-Appellees,

and

PAT WALKER,
Plaintiff-Intervenor-Appellee,

v.

PAUL R. PHILBROOK, ET AL.,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF VERMONT

BRIEF OF APPELLEES

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ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in finding that 45 C.F.R. §232.10, and Vermont Welfare Assistance Manual §2303, are inconsistent with 42 U.S.C. §602(a)(25), in their requirements that children in ANFC-benefited Vermont families must obtain and supply social security numbers as a requirement of eligibility for ANFC?

2. Whether the District Court erred in denying plaintiffs' Motion for Class Certification?

STATEMENT OF THE CASE

Plaintiffs are satisfied with the federal defendant's statement of the case, and his recitation of the undisputed facts of the case, and thus will not further elaborate on those points. See Rule 28(b) F.R.A.P.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT 45 C.F.R. §232.10 AND VERMONT WELFARE ASSISTANCE MANUAL §2303, ARE INCONSISTENT WITH 42 U.S.C. §602(a)(25).

The District Court concluded that 45 C.F.R. §232.10 and Vermont Welfare Assistance Manual §2303, are inconsistent with 42 U.S.C. §602(a)(25) in their requirement that children of Vermont families receiving Aid to Needy Families with Children (ANFC), must obtain and supply social security numbers to the state welfare department as an eligibility requirement for ANFC. App. 40-41.

The relevant portion of 42 U.S.C. §602(a)(25) reads as follows:

(a) A State plan for aid and services to needy families with children must... (25) provide (A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number (or numbers, if he has more than one such number), and (B) that such State agency shall utilize such account numbers, in addition to any other means of identification it may determine to employ in the administration of such plan.

The pertinent portion of 45 C.F.R. §232.10 provides as follows:

The State plan must provide that:

a) As a condition of eligibility each applicant for or recipient of aid will be required:

1) to furnish to the State or local agency a social security account number, hereinafter referred to as an SSN (or numbers, if more than one has been issued);

2) If he cannot furnish an SSN (either because such SSN has not been issued or is not known), to apply for such number through procedures adopted by the State or local agency with the Social Security Administration. If such procedures are not in effect, the applicant or recipient shall apply directly for such number, submit verification of such application, and provide the number upon its receipt.

e) The State or local agency will use such account numbers, in addition to any other means of identification it may determine to employ, in the administration of the plan.

f) "Applicant" and "recipient" include the caretaker relative, the children, and any other individual whose needs are considered in determining the amount of assistance.

Vermont Welfare Assistance Manual §2303, adopted to conform to 45 C.F.R. §232.10 provides similarly.

As the District Court observed, the determination whether the regulations are inconsistent with the statute depends entirely on the construction of the words "applicants for or recipients of

aid", as used in 42 U.S.C. §602(a)(25). App. 39. If it is determined that Congress intended those words to include only "caretaker relatives" who apply for or receive AFDC on behalf of "dependent children", and not the children themselves, then HEW's interpretation of the statute in 45 CFR §232.10 would be inconsistent with the statute, and therefore invalid, as not authorized by 42 U.S.C. §1302. App. 39-40.

42 U.S.C. §602(a)(25) was added to the Social Security Act by the Social Services Amendments of 1974. Pub. L. No. 93-647, 88 Stat. 2337. The basic purpose of the amendments was to provide a more effective way of collecting support payments from absent parents whose children were receiving ANFC benefits. The amendments set up a Parent Locator Service; require recipients of ANFC to assign their support rights to the state welfare department; and provide a new system to locate and secure support from absent parents. See, 42 U.S.C. §653, et seq. However, 42 U.S.C. §602, the basic statutory eligibility requirements for ANFC programs was also amended by adding two (2) new sections, 42 U.S.C. §602(a)(25) and (26).

It is clear that both of these sections were closely tied to the general purpose of the amendments of providing a more effective way of collecting support payments from absent parents. The child-support and social security number provisions of P. L. 93-647 originated in the Senate. Conference Report No. 93-1943, 1974 U. S. Code Cong. and Admin. News, 8161, 8162.

The Senate Committee's total comment on the social security number provision is at the end of a long comment on the

child-support sections. See, Senate Report No. 93-1356; 1974 U. S. C. C. A. N., 8133-8134, 8145, 8148. The committee then stated:

"As an additional tool in pursuing missing parents and to simplify the administration of the AFDC and Child Support Programs, the Committee bill would require applicants for AFDC to furnish their social security numbers to State welfare agencies. These agencies in turn would be required by the bill to use recipients social security numbers in the administration of the AFDC program.

1974 U.S.C.C. A.N. p. 8152

This statutory background of 42 USC §602(a)(25) is particularly relevant in the issue here, as it shows that, with the Congressional focus on locating absent parents, it makes no sense to interpret the statute to require children to obtain social security numbers.

Put most simply, plaintiffs' statutory claim is that the statute only says 'applicants' and 'recipients' must supply their Social Security numbers, which implies they already have them, and that this includes only the parents or other caretaker relatives, and not the children. This is seen most clearly by examining the new section 42 U.S.C. §602(a)(26), which was adopted at the same time. Ordinary principles of statutory construction require that words used in the same enactment be given the same meaning, and this rule is particularly strong where words are enacted at the same time. Erlenbaugh v. U. S., 409 U.S. 239, 244 (1972).

Another similar rule of statutory construction is that words and phrases found in different sections of related statutory material should be interpreted to avoid inconsistencies, particularly

when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intentions of Congress. App. 40-41. U. S. v. Raynor, 302 U. S. 540, 547 (1938).

Turning then to 42 U.S.C. §602(a)(26), that section provides in its relevant part that:

26)...each applicant or recipient will be required- A) to assign the State any right to support from any other person such applicant may have i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid...
B) to cooperate with the State...
ii) in obtaining support payments for such applicant and for a child for whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child..."
(emphasis added)

By comparing these two sections, adopted simultaneously and found right next to each other, the error of the defendant's interpretation becomes clear. In section (a)(25), the statute just talks of an 'applicant' or 'recipient' of aid, while section (a)(26) talks of an 'applicant', 'recipient' or 'any other family member for whom the applicant is applying for or receiving aid', and 'a child for whom such aid is claimed'. Thus, section (a)(25) should not be interpreted to include the children of applicants and recipients. If Congress had intended for children to be included in (a)(25) they easily could have said 'applicants, recipients and their children for whom such aid is claimed', or 'applicants, recipients, and any other family member for whom the applicant is applying for or receiving aid.' This is precisely what was said in (a)(26), and thus when Congress omitted the word

'child' or other such references in (a)(25), it seems very clear that they did not intend children to be included in the social security number requirement.

The federal defendant never directly treats this glaring inconsistency, and attempts to obfuscate this issue by stressing that children are the primary beneficiaries of the AFDC program, and thus that it would be illogical to exclude children from the phrase 'applicant for or recipient of aid'. Brief for the Federal Appellant, pp. 10-13.

Plaintiffs do not and cannot dispute that children are the primary beneficiaries of the AFDC program, but that is not the issue. Plaintiffs do not say that, in the broad sense, children are not recipients of AFDC, but only that in adding sections (a)(25) and (26) Congress very deliberately used the language chosen, and dealt with this particular problem by referring to children, in (a)(26), as 'a child for whom such aid is claimed' or 'any other family member for whom the applicant, is applying for or receiving aid'. These provisions recognize the reality of the situation in that although children are the beneficiaries of AFDC, it is their parents or other caretakers relatives that actually apply for or receive the aid. By using the above phrases in (a)(26) Congress specifically recognized that a child would not be an applicant or recipient, but would be a person on behalf of whom a parent applies for aid.

Thus, by simply using the language 'applicant' or 'recipient' in (a)(25) it is clear, when read with (a)(26), that Congress didn't intend (a)(25) to include the children on whose behalf the aid is sought.

In addition to the District Court here, in the case of Millikan v. Califano, the U. S. District Court for the District of Minnesota, Fourth Division, per Senior District Judge Larson, ruled similarly in issuing a preliminary injunction (copy of Memorandum and Order attached hereto as this decision is not yet reported).

The Court there noted that (a)(25) reads 'applicants or recipients' of aid, and that although children could be recipients of aid, they clearly are not applicants, for they do not make the application for aid. Id.

As noted above, the federal defendant did not treat this obvious conflict directly. He cites to various other statutory provisions in the Social Security Act which talk of 'children receiving aid'. Brief at 11-12. Yet those other sections specifically use the word 'child' or 'children', as does (a)(26), and unlike (a)(25). This only strengthens plaintiffs' arguments for it shows that when Congress wanted to specify 'children' it used the word 'children', and thus by its omission of that word in (a)(25) it did not intend for children to be covered in that section.

The District Court's interpretation of the statute is also supported by reviewing the basic purpose of the amendments, which, as previously noted, was to secure support from absent parents. Thus, it is rational to want social security numbers of the parents, but not of the children. Although the federal defendant, in his brief, lists various other uses of SSN's, it is clear that the purpose of the amendments was to deal with

getting support, so the fact that the defendant can think of other uses for the numbers does not mean that Congress intended for the numbers to have those uses.

It also should be noted that the Act only says social security numbers should be 'furnished' to the welfare department; it does not say persons who do not have numbers have to apply for them and get them and then supply them, as the challenged regulations require. The significance of this point is not simply the additional requirement which could be justified for parents, but that Congress was only thinking of adults, who normally would have social security numbers, and not children, who normally would not have them. If Congress had intended for (a)(25) to cover children it would have dealt with the question of applying for such numbers first, as that would be an obvious issue.

Two other statutes support the district court's decision, and the first of these is 42 U.S.C. §405(c)(2)(B)(i)(II). That section provides that in connection with its duties pursuant to the Federal Old Age, Survivors and Disability Insurance program, 42 U.S.C. §401 et seq., the Secretary should take affirmative means to assure that SSN's were assigned "to any individual who is an applicant for or recipient of benefits under any program financed in whole or in part from Federal funds including any child on whose behalf such benefits are claimed by another person." (emphasis added).

Once again, as in 42 U.S.C. §602(a)(26), Congress specifically dealt with a situation where aid would be furnished on behalf of a child, and once again Congress specifically used

the language 'including any child on whose behalf such benefits are claimed'. In our case, Congress did not deliberately provide that ANFC-benefited children must provide SSN's.

Finally, the implications on this case of the Federal Privacy Act of 1974 must be analyzed. There are two ways that the Privacy Act affects this case: in its direct statutory prohibitions; and, perhaps more importantly, in the background it provides as to Congressional intent in dealing with problems regarding SSN's.

As to the first, Section 7 of the Privacy Act, Pub. L. 93-579, 88 Stat. 1896, provides in its relevant part:

- 7.(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
- 2) The provisions of paragraph 1) of this subsection shall not apply with respect to -
 - A) any disclosure which is required by Federal statutes.
 - b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

The District Court did not rule on whether the regulations here in issue specifically violate §7 of the Privacy Act, as that was not necessary to the decision. App. 43. The District Court did use the Congressional intent behind the Privacy Act to support its interpretation of 42 U.S.C. §602(a)(25), and that will be discussed shortly. However, on the specific Privacy Act claim, since the District Court did not rule on it, any discussion of this issue might be unwarranted, but since the federal defendant did comment on this aspect of the case, see Brief at 21-22, it will

be treated very briefly here.

First, the Privacy Act states that its provisions do not apply where disclosure is required by a Federal statute. Here, the statute does not require such disclosure, but only a federal regulation interpreting the statute. Thus, if there is any reasonable doubt as to the construction of 42 U.S.C. §602(a)(25), it should be resolved against extending it to require children to obtain social security numbers as that might involve a violation of this section of the Privacy Act.

Second, the Privacy Act requires that the agency disclose to the parties what uses will be made of the SSN's. Here, the only indication of usage is given in the challenged regulations which broadly state that they will be used in the administration of the AFDC program. See, 45 C.F.R. §232.10(e); Vermont Welfare Assistance Manual §2303. It seems clear that this broad language does not satisfy the statutory mandate. In fact, in the favorable decision the government received in Chambers v. Klein, 419 F. Supp. 569 (D.N.J. 1976), the court there noted, in a similar context, that there was a violation of this provision of the Privacy Act, although it held this did not warrant injunctive relief. Id at 580.

However, the real significance of the Privacy Act here is its showing of strong Congressional views on the use of SSN's, and that this showing should properly influence the interpretation of another statute, dealing with the usage of SSN's, to restrict such usage in line with the spirit of the Privacy Act.

The importance which Congress attached to limiting the proliferating use of the social security number as a universal identifier and developing safeguards for situations where SSN's are requested is evidence throughout the legislative history of the Privacy Act. Through enactment of this legislation Congress sought to create certain safeguards to protect individuals from the unwarranted invasion of their personal privacy, and, in the preamble to the Act, Congress found that the right to privacy is a personal and fundamental right protected by the Constitution. Developments in telecommunications, photo-copying and computer technology have facilitated the ability of both government and private industry to exchange data, and Congressional action was seen as necessary to avoid the prospect of widespread violations of civil liberties through national data banks and the like.

A critical element in this situation was the expanded use of SSN's as means of identification, a practice that Congress considered to be one of the most serious privacy concerns in the nation. The Senate Report stated:

The Committee considers this usage of the [social security] number of a government file one of the most serious manifestations of privacy concerns in the Nation...The committee realizes that the number is a major element in the national debate over privacy since a common numerical identification or symbol to designate and index each person is an essential feature of a national data bank... Citizen's complaints to Congress and the findings of several expert study groups have illustrated a common belief that a threat to individual privacy and confidentiality of information is posed by such practices. The concern goes both to the development of one common number to label a person throughout society and to the fact that the symbol most in demand is the SSN... Of major concern is the possibility that the number may become a means of violating civil liberties by

easing the way for intelligence and surveillance
uses of the number for indexing and locating
the person..." U.S.C. A.N. pp. 6943-49

The report goes on at length to discuss many other problems raised by the extended usage of SSN's.

The same Senate Report stated that a prior study had indicated that a major area of priority for Congressional concern was "...limitations on the current, unregulated use of the Social Security number..." U.S.C.C. A.N. p. 6921. The Privacy Act itself set up a commission, one of whose purposes was to investigate the use of SSN's as an identifier and its use in any computerized banks and information systems.

Thus, the legislative history of the Privacy Act shows beyond any doubt that the spreading usage of SSN's was a major Congressional concern, and the Act was an initial attempt to limit this. At the same time, Congress passed 42 U.S.C. §602(a) (25), and it seems clear that any doubts as to the proper interpretation of that section have to be resolved by limiting the usage of SSN's rather than expanding the same. The district court properly took this into consideration in resolving the issue of statutory construction raised here. App. 42.

The federal defendant tries to minimize the obvious intent and strong Congressional feelings regarding SSN's exhibited in the Privacy Act, by pointing to the passage of the Tax Reform Act of 1976. Brief at 22-27. He characterizes the Privacy Act as a 'temporary moratorium' on the further expanded usage of SSN's. Brief at 22. By reading through the legislative history, the inaccuracy of this characterization is obvious.

He then seeks to bolster his case by stating that Congress clearly reevaluated its position regarding SSN's when it passed the Tax Reform Act. It should be noted that the Tax Reform Act was a massive piece of legislation dealing with a wide variety of tax reforms, and the section the defendant relies upon to neutralize another major Congressional enactment, the Privacy Act, is a total of three (3) paragraphs out of the sum total of the Tax Reform Act.

That section provides that states may utilize SSN's in the administration of state general assistance programs. The defendant admits that this section only applies to state general assistance programs, and not to the federal AFDC program, Brief at 26, and thus the relevance of this enactment seems obscure. In fact, plaintiff's submit that since Congress did not authorize extended usage of SSN's in the AFDC program when it specifically dealt with that situation regarding the state welfare programs, it intended to leave untouched the limitations contained in the letter and spirit of the Privacy Act. Certainly, the defendant has not pointed to any legislative history that shows that Congress intended the Tax Reform Act to affect the interpretation of 42 U.S.C. §602(a)(25).

Thus, plaintiffs submit that the original strong thrust of the Privacy Act regarding the abuse of SSN's and the limitations on the usage of the same remain intact, and that the strong Congressional concerns expressed in the Privacy Act support an interpretation of 42 U.S.C. 602(a)(25) that limits, rather than expands, the usage of SSN's. See Millikan v. Califano, supra.

II. THE DISTRICT COURT ERRED IN DENYING
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

Plaintiffs do allege that the District Court erred in one respect in this case, and that was in denying plaintiffs' Motion for Class Certification. In the court's opinion of February 24, 1977, it noted that plaintiffs' had not moved for class certification, and thus it disregarded the class action allegations of the complaint. App. 36. After this opinion was handed down, plaintiffs' filed a Motion for Class Certification on March 11, 1977, and a hearing was held on said Motion and an oral order was entered denying the Motion. App. 3-4.

Plaintiffs contend that it was an abuse of discretion to deny this admittedly belated Motion. The plaintiffs' had not formally moved for class certification at an earlier juncture because they were awaiting disposition of the defendant's Motion to Dismiss on jurisdictional grounds and thus a Motion for Class Certification seemed inappropriate. As the District Court's opinion notes, initially the jurisdictional issue was strenuously contested. App. 35. Thus, plaintiffs believed that moving for class certification should properly have awaited disposition of the Motion to Dismiss.

There exists direct authority for certifying a class action subsequent to the Court's determination of the merits. In Jimenez v. Weinberger, 523 F.2d 689 (7 Cir. 1975) cert den 427 U.S. 912 (1976) then Judge Stevens held that F.R.C.P. 23(c)(1) contemplates some flexibility in its enforcement such that Rule 23 (b) (2) class actions may be determined subsequent to resolution

of the merits.

The reasoning underlying the Jimenez holding is directly applicable here. The Court analyzed the notice requirements of Rule 23, and held that since the notice requirement is inapplicable to Rule 23(b)(2) class actions, that a post-judgment certification of a class action was permissible. Thus, it is clear that the District Court could certify this as a class action, if all of the other requirements of Rule 23 are met.

Here, there clearly were questions of law and fact common to the class; the claims of the respective parties were the same as that of all class members; and the representative parties obviously could fairly and adequately protect the interests of the class. Rule 23(a)(2-4). Moreover, the defendants have acted on grounds generally applicable to the class thereby making final injunctive relief or declaratory relief appropriate to the class as a whole. Thus, the requirements of Rule 23(b)(2) are satisfied.

Finally, as to the numerosity requirement of Rule 23(a)(1), the state defendant's Answer to Interrogatories, dated March 5, 1976 clearly showed that the size of the class would be too large to enable joinder.

Thus, all of the requirements of Rule 23 are clearly met, and this is the type of case which is an example of a classic (b)(2) class action, and so plaintiffs submit that the District Court erred in denying their post-judgment Motion for Class Certification.

CONCLUSION

Thus, for the foregoing reasons, appellees request that the judgment of the District Court be affirmed, with the qualification that the District Court's denial of plaintiffs' Motion for Class Certification be reversed and that a class action be certified here.

Respectfully submitted,

Dated: 9/30/77

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Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded to the following by mailing a copy thereof, first class mail, proper postage affixed, to the following addresses:

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Dated: 9/30/77

Zander B. Rubin
Zander B. Rubin, Esq.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Clark Millikan, individually and on behalf of his minor child; Emily Bergin, individually and on behalf of her five minor children; Jean Orsello, individually and on behalf of her minor child; and all persons similarly situated,

Plaintiffs,

vs.

Joseph Califano, individually and as Secretary of the Department of Health, Education and Welfare; Vera Likins, individually and as Commissioner of the Minnesota Department of Public Welfare; Jeff Spartz, Thomas E. Tice, Richard E. Kremer, John E. Derus, E. F. Robb, Jr., Sam P. Sivanich, and Nancy Olkon, individually and as members of the Hennepin County Welfare Board,

Defendants.

MEMORANDUM AND ORDER

No. 4-77-Civil 159

Plaintiffs, caretaker relatives of children who receive Aid to Families with Dependent Children (AFDC), have brought suit in this Court to obtain relief from the requirement that they apply for social security numbers for the children in order to remain eligible for AFDC. Two of the adult plaintiffs have refused to provide the numbers and the third has provided them under protest. On April 29, 1977, plaintiffs were granted a temporary restraining order requiring the Minnesota Department of Public Welfare (DPW) and the Hennepin County Welfare Department (County) to continue issuing checks to plaintiffs despite their refusal to provide the children's social security numbers.

DPW instituted this requirement in response to new regulations promulgated by HEW in 1976, under a 1975 amendment to the Social Security Act. The statute, 42 U.S.C. § 602(a)(25), requires the states to provide in their welfare programs:

"(A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number (or numbers, if he has more than one such number), and (B) that such State agency shall utilize such account numbers, in addition to any other means of identification it may determine to employ in the administration of the plan"

The regulation defines "applicant" and "recipient" as the caretaker relative, the children, and any other individual whose needs are considered in determining

the amount of assistance." 45 C.F.R. § 202.10(1). It requires these persons to provide the numbers or to apply for them, through the welfare agency if it has procedures for doing so, in order to qualify for or continue to receive AFDC payments.

According to the "Welfare Enumeration Manual" issued by the Social Security Administration, county welfare departments may use either of two standard application forms, the SS-5 or the SS-9635. The County apparently provides applicants with the shorter SS-5 form, along with instructions for filling it out. The County then is required to add to the form a "welfare identification number" consisting of a three-digit BENDIX code, which identifies the location of the welfare office and the local case number. Applications generated through the welfare departments are to be sent in batches and are returned in those same batches rather than individually. The welfare identification number is used to route the Social Security Administration's verification to the correct office. Each month the Social Security Administration sends a tape to the State welfare department, verifying by case number those social security numbers that have been issued. The social security cards are sent directly to the welfare recipients. According to representatives of DFW, the numbers are recorded in the files and the tapes then are destroyed.

Plaintiffs now seek to enjoin HEW and the State and county welfare departments from enforcement of the regulations. They assert a number of grounds for such injunction, including violation of the Civil Rights Act and State and Federal privacy laws. Defendant HEW has moved for summary judgment, but the other defendants have not. The motion for summary judgment must be denied at this point and plaintiffs are entitled to the preliminary injunction on statutory grounds.

Jurisdiction -

Jurisdiction is invoked here pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), and 1361. The Federal defendant has objected that § 1331(a) does not grant jurisdiction over it in a case such as this, in which not all defendants are agencies or officers of the United States. The Court cannot agree. The Court also finds that jurisdiction over the State and county officials is proper under 28 U.S.C. § 1343(3), insofar as the plaintiffs have a colorable constitutional claim. Hagans v. Lavine, 415 U.S. 528 (1974).

Class Certification -

Plaintiffs request certification of a class consisting of "all those

persons, children and adults, in the State of Minnesota, whose eligibility for AFDC benefits rests on furnishing the social security numbers of dependent children." The class includes two subclasses, one of persons who have provided the numbers and one of those who have not. The Court finds that the class satisfies the requirements of Federal Rule of Civil Procedure 23(a) as to numerosity, commonality of questions of law and fact, typicality, and adequacy of representation. The defendants have acted on grounds applicable to all class members, by promulgating a regulation that applies to all AFDC recipients. F.R. Civ. P. 23(b)(2). According to the mandate of Nochle v. Liking, 538 F.2d 229 (8th Cir. 1976), certification is particularly appropriate in a case in which the named plaintiffs may change status at any time, thus rendering the case moot. Therefore, the class is certified as requested.

Preliminary Injunction -

Plaintiffs are entitled to a preliminary injunction if they can establish that they will suffer irreparable injury unless the request is granted, that they stand a good chance of succeeding upon trial on the merits, and, to a lesser degree, that the amount of harm suffered by defendants upon granting of the injunction would not outweigh the benefit to plaintiffs and the public interest would be served by granting it. Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 at 1326 (8th Cir. 1973).

If plaintiffs stand any reasonable chance of succeeding on the merits, the injunction must be granted because the irreparable nature of the injury--denial of welfare benefits through enforcement of a probably invalid regulation--is apparent. Nelson v. Liking, 389 F. Supp. 1234 at 1237 (1974), aff'd 510 F.2d 414 (8th Cir. 1975). Defendants may claim harm to the finances of the respective public agencies they head, and equivalent harm to the public interest as a result of possibly improper and probably irrecoverable payments, but the necessity of plaintiffs and the strength of their case far outweighs these factors. Accordingly, the preliminary injunction may be granted.

Plaintiffs claim that the regulations under which the State and county officers require social security numbers is inconsistent with the requirements of the Social Security Act in that the regulatory definition of "recipients or applicants" to include children is not within either the meaning or the policy of the statute. The Court must agree that this definition extends the enumeration requirement beyond that contemplated by Congress in enacting the statute.

The statute at issue here requires "recipients or applicants" to provide

social security numbers "as a condition of eligibility." While it is possible to read this as applying to all persons who could be eligible, including children, the use of the disjunctive "or" indicates application only to the one person in the family who actually applies for or is currently receiving money from the welfare agency. Children may be "recipients," but they clearly are not applicants, for they do not make the application for aid. If they are to be included in the enumeration requirement, the statute should read, at the least, "applicants and recipients." As it stands, this Court sees the term as contemplating (1) adult persons who are applying for the first time and must provide numbers upon application; and (2) those adult persons who already are receiving aid and must provide numbers to remain eligible.

Given the ambiguity of the statute, the Court must consider as well the principles of statutory construction. Words used in the same statute must be construed, as far as logic will allow, according to a presumption that they were intended to have the same meaning. Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932); Patterson v. Iowa Bonus Board, 246 Iowa 1087, 71 N.W.2d 1 at 6 (1955). Defendants have correctly pointed out that there will always be a certain imprecision or inconsistency in usage as between the many different sections of a comprehensive legislative act that is subject to piecemeal amendment or compromise; the Court's responsibility for fashioning a consistent reading is undiminished, and perhaps is enhanced, by this realistic consideration. In 42 U.S.C. § 602(a)(26), which requires assignment of support rights and parental cooperation in establishing paternity, "applicant or recipient" clearly includes only adults who have the care or AFDC-eligible children, because the statute refers specifically to "child" or "children," in the necessary contexts, as differentiated from "applicants" or "recipients." The enumeration requirement of 42 U.S.C. § 602(a)(25) was established as an aid to the child support program as well as for administrative convenience, S. Rep. 93-1356 (Dec. 14, 1974), 1974 USCCAH, p. 8152, and it is consistent with the context of both statutes to regard the caretaker relative as the only person whose social security number may be useful in keeping track of families that are entitled to support and in tracking down absent or potentially deserting parents.

The legislative history of this statute does not indicate a purpose other than that stated, and neither "administrative convenience" nor the child support program would be served by using children's social security numbers. The Court cannot conceive of circumstances in which the social security numbers of the

children would be necessary to aid in finding an absent parent. The checks are issued to a family unit identified by the case file number and caretaker relative's social security number, and the children's numbers are not useful in the identification context either because cross-checking for duplicate payments requires only one identification number, and the children in the home are not any more identifiable by number than by name. Indeed, counsel for the State defendant in a similar case has stated that the State welfare agency had no plan to use the children's numbers and that HEW had made no recommendations as to possible use; upon inquiry, the Court found that HEW would "provide technical assistance" to the states to enable them to use the numbers, but no specific uses were suggested. Chambers v. Klein, 419 F. Supp. 569, 579-80 (D. N.J. 1976).

The State defendant here has claimed that the children's numbers may be used to help prevent welfare fraud and duplication of payments. Although prevention of fraud is a commendable goal, it cannot be accepted as a blanket justification for every eligibility condition imposed on welfare recipients, particularly when Congress has not stated it as a purpose. The enumeration requirement is not a useful tool for prevention of fraud, because, as the statute² acknowledges, the Social Security Administration does not limit the number of social security numbers one may have. The central files are kept by number rather than by name, and applications are not cross-checked by name. Therefore any recipient seeking to claim eligibility of children not her own may state to the caseworker that these children do not have social security numbers; they would then be issued new numbers and could be identified to more than one case file. A social security number is a very poor way to trace any person, such as a nonworking minor, who has no stake in using only one number.

In addition, the Court notes that during the same session in which this statute was added, Congress also enacted the Privacy Act of 1974. This Act prohibits government agencies from requiring disclosure of social security numbers as a condition of eligibility for statutory benefits; one of the few exceptions allows such disclosure requirements to be imposed if a Federal statute requires the disclosure. 88 Stat. 1896 §§ 7(a)(1), 7(a)(2)(1974); 5 U.S.C.A. § 552a note. This manifestation of congressional concern over abusive use or requirement of social security numbers suggests that any such requirement should be read narrowly. The statute in question here does not specifically state, as it easily could, that children's social security numbers must be given. If they are to be required, Congress easily can change the statute to make that

clear.

In support of their arguments concerning congressional intent, defendants have drawn the Court's attention to additional statutes under which the Secretary of HEW must require social security numbers for persons receiving or potentially receiving benefits under certain programs. Under 42 U.S.C. § 405(c)(2)(F)(i), the Secretary is required to "take affirmative measures" to have numbers assigned:

"(II) to any individual who is an applicant for or recipient of benefits under any program financed in whole or in part from Federal funds including any child on whose behalf such benefits are claimed by another person"

This requirement, however, is specifically linked to the Secretary's duty to maintain wage records in connection with old age, survivors', and disability benefits, Subchapter II of the Social Security Act, 42 U.S.C. §§ 405(c)(2)(A), 405(c)(2)(B)(i). It has no connection with the procedures under Subchapter IV, Aid to Families with Dependent Children. The cited sections only serve to illustrate the proposition that if social security numbers are to be required for children, Congress can and does specifically outline such requirements.

Defendants also claim that 42 U.S.C. § 405(c)(2)(C)(i) clearly sets forth a policy allowing the states to require social security numbers in cases such as this one. That recently enacted statute reads:

"(C)(i) It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Secretary for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Secretary."

Again, however, the Court finds this statute inapplicable to the argument. It allows the states to use social security numbers in State-administered programs, but does not require such use, and therefore does not support either the DEW and County claims that HEW requires such use of social security numbers or the HEW claim that the numbers are a Federal statutory requirement. Moreover, the statute allows use of the numbers in administration of general public assistance programs but does not mention AFDC or any other child welfare program established under Federal law and, placed as it is in Subchapter II of the Social Security Act, has no bearing on administrative requirements of Subchapter IV, AFDC.

The Court also is mindful of the principle that the interpretation of a

statute given by the agency charged with its enforcement is to be given deference, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969), but cannot accept the result of applying that principle where all indications are that the agency has interpreted the statute incorrectly.

Having disposed of the question on statutory grounds, the Court need not deal with the constitutional claims. Hagans v. Lavine, supra.

IT IS ORDERED:

1. That a class be certified as plaintiff in this case, consisting of all those persons, children and adults, in the State of Minnesota, whose eligibility for AFDC benefits rests, among other requirements, on furnishing the social security numbers of the claimed dependent children.

2. That the motion of defendant Califano for summary judgment be, and hereby is, denied.

3. That plaintiffs' motion for preliminary injunction be, and hereby is, granted. Defendants are enjoined, pending termination of this action, from:

A. Requiring that children have social security numbers as a condition of their eligibility for Aid to Families with Dependent Children.

B. Terminating assistance to children if their caretaker relative refuses to supply the children's social security numbers to the local welfare department.

C. Requiring that children have social security numbers as a condition of eligibility of the caretaker relative for Aid to Families with Dependent Children.

D. Terminating assistance to caretaker relatives if they refuse to supply the children's social security numbers.

July 15, 1977.

/s/ Earl R. Larson

United States Senior District Judge

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FOOTNOTES

1. Section 232.10 reads as follows:

The State plan must provide that:

(a) As a condition of eligibility, each applicant for or recipient of aid will be required:

(1) To furnish to the State or local agency a social security account number, hereinafter referred to as the SSN (or numbers, if more than one has been issued); and

(2) If he cannot furnish a SSN (either because such SSN has not been issued or is not known), to apply for such number through procedures adopted by the State or local agency with the Social Security Administration. If such procedures are not in effect, the applicant or recipient shall apply directly for such number, submit verification of such application, and provide the number upon its receipt.

(b) For new applicants, the requirements of paragraph (a) of this section shall be effective July 1, 1975; and, for current recipients, it shall be effective as determined by the State agency but not later than the time of the next redetermination of eligibility required by § 206.10 (a)(9) of this chapter.

(c) The State or local agency will assist the applicants for SSNs and will comply with the procedures and requirements established by the Social Security Administration for application, issuance, and verification of social security account numbers. For the purposes of AFDC foster care, the application for the SSN will be made by the State or local agency.

(d) The State or local agency will not deny, delay, or discontinue assistance pending the issuance or verification of such numbers if the applicant or recipient has complied with the requirements of paragraph (a) of this section.

(e) The State or local agency will use such account numbers, in addition to any other means of identification it may determine to employ, in the administration of the plan.

(f) "Applicant" and "recipient" include the caretaker relative, the children, and any other individual whose needs are considered in determining the amount of assistance.

2. 42 U.S.C. § 602(a)(25)(A): "each applicant . . . shall furnish . . . his Social Security account number (or numbers, if he has more than one . . .)."

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